Supreme Court, U.S.
FILED

981638 APR 12 1999

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

C.W. SMITH, SMITH'S LAKE CORPORATION and GRADY SMITH,
Petitioners,

v.

GWINNETT COUNTY, GEORGIA,
Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of Georgia

PETITION FOR A WRIT OF CERTIORARI

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358P

QUESTIONS PRESENTED FOR REVIEW

1) Did the trial Court's order dated July 7, 1998 result in a taking of the Petitioner's property for public use requiring just compensation pursuant to the taking clause of the Fifth Amendment and *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 120 L.Ed.2d 798, 112 S.Ct. 2886 (1992)

2) Was the trial court's order permanently enjoining the Petitioners, their heirs and assigns from engaging in any construction activity upon the property, and permanently appointing a Court Ordered Monitor to be paid by the Petitioners, a valid exercise of police powers to substantially advance a legitimate State interest, as required by the Fifth and Fourteenth Amendments to the Constitution and *Nollan v. California Coastal Commission,* 483 U.S. 825, 97 L.Ed.2d 677, 107 S.Ct. 3141 (1987)

LISTING OF ALL PARTIES

Petitioner SMITH'S LAKE CORPORATION has no parent companies and no subsidiaries.

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PETITION FOR WRIT OF CERTIORARI

BASIS FOR JURISDICTION

The trial Court's Final Order requiring the Defendants to pay costs and issuing a permanent injunction and subsequent Final Judgment and Order Appointing Receiver, entered on July 7, 1998 and August 4, 1998 respectively, were affirmed in Docket Number S98A1959 in the Georgia Supreme Court on January 11, 1999. *Smith vs. Gwinnett County*Ga. 424 ____ S.E.2d _____, 1999.

The United States Supreme Court has jurisdiction over this Petition for Writ of Certiorari because Petitioners raise a compelling issue dealing with the taking of real property for public use without just compensation, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States. In this case, the Supreme Court of Georgia has decided important questions of federal constitutional law in a way that conflicts with the decisions of the United States Supreme Court, and particularly with its decision in *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 120 L.Ed.2d 798, 112 S.Ct. 2886 (1992).

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES

A. UNITED STATES CONSTITUTION

FIFTH AMENDMENT: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due

process of law; nor shall private property be taken for public use, without just compensation.

FOURTEENTH AMENDMENT: Section 1: All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein the reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

B. GEORGIA STATUTES

O.C.G.A. 23-1-7 Equity to Do Complete Justice:

Equity seeks always to do complete justice. Hence, having the parties before the court rightfully, it will proceed to give full relief to all parties in reference to the subject matter of the action, provided the court has jurisdiction for that purpose.

O.C.G.A. 23-4-37 Enforcement by Execution or Attachment:

Every decree or order of a superior court in equitable proceedings may be enforced by attachment against the person for contempt. Decrees for money may be enforced by execution against the property. If a decree is partly for money and partly for the performance of a duty, the former may be enforced by execution and the latter by attachment or other process.

C. GWINNETT COUNTY ORDINANCES

"The 1985 Zoning Resolution of Gwinnett County, Georgia," as revised December 1994:

Article III Definitions:

Buffer. Land area used to visibly separate one use from another through screening and distance; to shield or block noise,

light, glare, or visual or other conditions; to block physical passage to non-similar areas; or to reduce air pollution, dust, dirt, and litter.

Section 606 Buffer Between Dissimilar Districts:

Section 606.1 A buffer shall be required for the following:

1. All property zoned for commercial, neighborhood shopping, office business parks or industrial uses shall have a buffer along any rear and side property lines abutting a residential district.

STATEMENT OF THE CASE

A. THE PROPERTY: Petitioners C. W. Smith and Grady Smith are brothers. C. W. Smith owns all of the stock in Petitioner Smith's Lake Corporation. In April, 1995, Smith's Lake Corporation purchased a fee simple interest in a seventy acre parcel of land in Gwinnett County, Georgia. On that parcel was an earthen dam and a fifty acre lake known as Freeman Lake, which was fed by Beaver Ruin Creek. Hereafter the entire parcel will be referred to as the "Freeman Lake Property".

Freeman Lake has been designated as a flood way by the Federal Emergency Management Agency (FEMA), and is a designated wetlands area regulated by the Army Corps of Engineers (ACOE). The Georgia Department of Natural Resources has periodically inspected the dam under Georgia's Safe Dams Act, but has declined jurisdiction over it.

Gwinnett County has zoned the Freeman Lake Property as C-2 commercial, general business. On one side of the Freeman Lake property is a residential subdivision and Arcadia Drive. On the other side is another subdivision and Plantation Lane. The Gwinnett County zoning ordinance requires that a seventy-five foot buffer area be maintained on commercial property when it is adjacent to property zoned residential.

B. REPAIRS TO THE DAM: After purchasing the Freeman Lake property, the Petitioners began to repair the existing dam. To accomplish this, the Petitioners breached the dam, drained the lake, and brought in loads of dirt and other material for use in repairing the dam. They began to clean up the lake bottom by removing stumps and debris. They also dug trenches in the bottom of the now empty lake as part of the repairs and cleanup.

At some point just before or immediately after the repairs began, Gwinnett County informed the Petitioners that there was no County Regulation that would prevent them from draining the lake. However, the County also informed the Petitioners that they were required to obtain permits from Gwinnett County, FEMA and ACOE before any construction.

C. LITIGATION: When Petitioners continued to repair the dam without a County permit, Respondent initiated litigation seeking equitable relief in the Superior Court of Gwinnett County in Civil Action File No. 95-A-5000. At the same time, the County also issued several citations against the Petitioners for violation of the County's development ordinances.[1]

The trial court issued a Temporary Restraining Order on August 2, 1995, which was converted into an Interlocutory Injunction on September 11, 1995. Later, on March 25, 1996, the parties agreed to a Consent Order which would have allowed the Petitioners to repair the dam in accordance with applicable regulations, after completion of engineering studies.

This was not to be. On October 15, 1996, the court entered an Order for Contempt, Injunctive, and Other Equitable Relief. The Smiths appealed that order, which was affirmed. *Smith v. Gwinnett County*, 268 Ga. 179, 486 S.E.2d 151 (1997). Petitioners applied to this Court for Certiorari this occasion, but were

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[1] The Petitioners were acquitted on some of the citations. The others were not prosecuted.

denied. *Smith vs. Gwinnett County*, __U.S.__ 139 L.Ed.2d 637, 118 S.Ct. 691 (1999).

Thereafter, on July 7, 1998, the trial court entered a Final Order Requiring The Defendants To Pay Costs And Issuing A Permanent Injunction (Appendix 2). This was followed by a Final Judgment and Order Appointing Receiver dated August 4, 1998. (Appendix 3) Under the orders, the Freeman Lake Property was ordered sold to at public auction to satisfy the lien in favor of Gwinnett County.

PRESERVATION OF ISSUES:

The Petitions first raised the issue of taking without compensation in the trial court. The trial court specifically addressed the issue in the Order for Contempt, Injunctive and Other Equitable Relief dated October 15, 1996. The Petitioners appealed to the Georgia Supreme Court, which addressed this issue, holding that there was no taking. The court also held that the trial court had acted within its equitable powers when it took control of the Freeman Lake Property and assessed costs against the Petitioners. *Smith vs. Gwinnett County*, 268 Ga. 179, 486 S.E.2d 151 (1997). Petitioners then appealed to the United States Supreme Court for Writ of Certiorari. That application was denied. *Smith et al vs. Gwinnett County*, Georgia, __U.S.__ 139 L.Ed.2d 637, 118 S.Ct. 691 (1999).

The Petitioners next raised the issue of taking without compensation before the trial court in the proceedings leading up to the trial court's final order requiring the Defendants to pay costs and issuing a permanent injunction dated July 7, 1998. That order and the Final Judgment and Order Appointing Receiver dated August 4, 1998, were appended to the Georgia Supreme Court. The taking issue was again raised before that court, which rejected the Petitions argument that the orders of the trial court worked a taking without compensation. *Smith vs. Gwinnett County*, S98A1959, 270 Ga. 424, __S.E.2d__ (1999).

ARGUMENT

The Petitioners are seeking Writ of Certiorari from this Court because of two provisions in the trial court's Final Order Requiring The Defendants To Pay Costs And Issuing A Permanent Injunction. (Appendix 2). These are (1) The imposition of a permanent injunction and (2) The appointment of a Court Ordered Monitor. The permanent injunction prohibits the Petitioners, their heirs, assigns, and/or agents from engaging in any construction activity on the property except for good cause shown to the trial court upon further hearing. The appointment of the court ordered Monitor grants the Monitor unrestricted access to the property to inspect it at any time and report to the trial court.

By now it is well understood that the Takings Clause of the Fifth Amendment to the United States Constitution is made applicable to the states through the Fourteenth Amendment. See *Chicago B & O R. Co. vs. Chicago*, 166 U.S. 226, 41 L.Ed. 72, 43 S.Ct. 158 (1897). It is also axiomatic that if State regulation goes too far, it will constitute a taking. *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415, 67 L.Ed. 72, 43 S.Ct. 158 (1922). While this Court has looked at government regulation cases on an essentially ad hoc basis, certain basic principles governing these inquiries have emerged.

In *Penn Central Transp. Co.v. City of New York,* 438 U.S. 104, 57 L.Ed.2d 631, 98 S.Ct. 2646 (1978), the Court identified those factors it considered to have particular significance; (i) the economic impact of the regulation on the claimant; (ii) the extent of the regulations interference with the property owners' distinct financial expectations, and (iii) the character of the government action. When the *Penn Central* factors are applied to this case, three facts stand out.

The government action in question is in the form of a permanent injunction which applies, not just to the Petitioners and their

agents, but to their heirs and assigns as well. A complete stranger to this action who purchases this property will be as bound by the injunction as the Petitioners themselves. The injunction in effect creates a permanent restrictive covenant in favor of Gwinnett County which runs with the land, independent of general zoning or land use restrictions on other similarly situated property and property owners.

The extent of the injunction's impact upon the property owners' expectation is obvious. The Freeman Lake property is zoned C2. It was designated as commercial property when it was purchased and still is. Obviously the petitioners either intend to use the property for commercial purposes themselves or sell it to a future purchaser as commercial property. It does not, however, have on it any commercial structures of any kind. The October 20, 1998 report prepared for the receiver plainly states that the only commercial value of the property lies in filling at least part of the lake to make room for a commercial structure. (Appendix 4) That, however, is exactly what the trial court has forbidden.

The economic impact of the injunction is obvious. The injunction strips the Petitioners or any future owner of the property of any right to develop the property, even in compliance with all other applicable zoning or other regulations. Before anyone can make any lawful economic use of the property, they must first obtain special dispensation from the Superior Court of Gwinnett County. No sensible potential purchaser wants to buy litigation, but by the terms of the trial courts injunction, that is what any potential purchaser gets with his or her deed. In short, the property although zoned for general business, will never have commercial value to any owner it may ever have unless the trial court exercises its discretion and lifts its permanent injunction. The lower court's order utterly destroys the Freeman Lake Property's economic value.

When scrutinized in light of the factors set out in *Penn Central Transp. Co. v. City of New York, supra,* it becomes apparent that

the trial court's injunction wipes out the Freeman Lake Property's commercial value to the Petitioners and to any potential buyer. It's economic value has been appropriated for "the health, safety and welfare of the citizens of Gwinnett County."

In 1992, this Court further considered the issue of regulation as a form of taking in *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 120 L.Ed.2d 798, 112 S.Ct. 2886. There the Court held that when a state enacts a regulation that deprives land of all economically beneficial use, it may avoid paying compensation *only* if it can show that the possible use interests were not part of the owner's title to begin with. As this Court itself said:

> "We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good ,that is, to leave his property economically idle, he has suffered a taking."

505 U.S. 1003, 1019, 120 L.Ed.2d 798, 815, 112 S.Ct. 2886.

The analysis in *Lucas* further hinged upon whether the State's regulation proscribes a use that was part of the owners title to begin with. The Petitioners purchased of the property subject to county zoning and land disturbance ordinances and both FEMA and ACOE. None of these however, barred construction activity on the property. None of the preexisting regulations mandated a showing of good cause to a court before an owner could make any commercial use of the property. Most important, none of the regulations or court orders pre-dating the permanent injunction bound the Petitioners' heirs and assigns to litigation as a condition precedent to any economically beneficial use of the property.

Again, whether reviewed in light of this Court's ruling in *Penn Central Transp. Co. v. City of New York, supra*, or under the

standard announced in *Lucas v. South Carolina Coastal Council*, the result of the trial court's order, the state's action toward the Petitioners' property, is the complete appropriation of the entire economic value of the Freeman Lake property for the benefit of Gwinnett County.

The trial court also appointed a Court Ordered Monitor to oversee compliance with the injunction, and granted that monitor unfettered authority to enter upon the property to "apprise the court of compliance with this order."

In *Nollan vs. California Coastal Commission*, U.S. 825, 97 L.Ed.2d 677, 107 S.Ct. 3141 (1987), this court emphasized that the right to exclude others is one of the most essential sticks in the bundle of rights that are commonly characterized as property. *Nollan, supra,* at 483 U.S. 831, 97 L.Ed.2d 686. While *Nollan* considered this right as applied to property reserved for the Nollan family's private use, *Dolan v. City of Tigard*, 512 U.S. 374, 129 L.Ed.2d, 304, 1145 S.Ct. 2309 (1994) extended this reasoning to property used to operate a business.

Here the right the county has appropriated is not the right to exclude the general public. Instead, a court monitor, in effect a quasi law enforcement officer, has been granted a blanket license to enter upon the property to enforce the order, whether or not he has probable cause to believe the injunction is being violated. The trial court's order is therefore analogous to a Writ of Assistance or a General Warrant. As this Court has had occasion to remind us, it was the abuse of such warrants which led to the Fourth Amendment to the Constitution. See *Marshall v. Barlows, Inc.* 436, U.S. 307, 56 L.Ed.2d 305, 98 S.Ct. 1816 (1978). Plaintiffs do not contend that this is a Fourth Amendment case *per se*. However, the trial court's order specifically precludes the Petitioners from excluding the Monitor from the property, no matter how frequent, intrusive or baseless his intrusions upon the property may be. For so long as the injunction and the Court

Ordered Monitor remain in place, the Petitioners' right to exclude others from the property had been taken, without compensation, on behalf of the county.

When considered in the light of this Court's cases, the trial court's Final Order Requiring the Defendants to Pay Costs and Issuing a Permanent Injunction is clearly a "taking" of the Freemen Lake Property for public use within the meaning of the Fifth Amendment to the United States Constitution. The property has no economic value without the right to fill all or part of the lake, but the Petitioners are banned from undertaking any construction activity. The ban extends beyond the Petitioners and their agents, encompassing their heirs and assigns as well. The petitioners or any future potential purchaser *must* engage in litigation to re-acquire the right to engage in construction on the property. In short, the Freeman Lake Property has been rendered economically useless. The property has been taken, and Gwinnett County must compensate the Petitioners.

CONCLUSION

For the above stated reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

In the Supreme Court of Georgia

Decided: January 11, 1999

S98A1959. SMITH V. GWINNETT COUNTY, GEORGIA.

CARLEY, Justice.

When C.W. and Grady Smith and Smith's Lake Corporation (the Smiths) began to develop their property without obtaining the requisite permits, Gwinnett County brought suit to enjoin them from further construction activity. The trial court entered a preliminary injunction. After subsequently finding that the Smiths were in criminal contempt of that order, the trial court took control of the property pursuant to its equitable powers and ordered the County to restore the property to its original condition, with the reasonable costs of that restoration to be assessed against the Smiths. The Smiths appealed, and this Court affirmed. *Smith v. Gwinnett County*, 268 Ga. 179 (486 SE2d 151) (1997). Thereafter, the trial court entered a permanent injunction and a final order as to the reasonable and necessary expenses of restoration. When the Smiths did not pay the amount of expenses assessed, the trial court entered a joint and several judgment against them, and appointed a receiver to take control of the property and sell it. It is from these orders that the Smiths bring this appeal.

1. The Smiths urge that the trial court's exercise of jurisdiction over the property violates the United States and Georgia Constitutions. The trial court originally took only the control of the property for the limited purpose of insuring its restoration. *Smith*, supra at 181(2). The trial court was authorized to assess the restoration expenses against the Smiths. *Smith*, supra at 181(3). When the defendants did not pay those expenses, it was permissible to levy on their property to satisfy the judgment against them. See OCGA § 9-12-80. Thus, the County did not take the

property in violation of the constitutional requirement of payment of just and adequate compensation. The court ordered a levy on the property in order to satisfy a valid personal judgment which the County obtained against the Smiths.

2. Although the Smiths urge that it was error to allow television coverage of the proceedings without their consent, their consent was not a prerequisite to the trial court's decision in that regard. OCGA § 15-1-10.1(b)(2) provides that the consent or objection of the parties or witnesses is but one factor for the trial court to consider in making its discretionary determination. Even assuming that the Smiths may have objected, they make no showing that, considering the other enumerated factors, it was an abuse of discretion to allow coverage or that, if it was, the error was harmful to them.

3. The Smiths contend that the permanent injunction is contradictory and confiscatory. A review of the order shows, however, that it is neither, and that it complies with the statutory requirement that an injunction be specific in its terms. OCGA § 9-11-65(d).

Judgment affirmed, All the Justices concur.

SUPREME COURT OF GEORGIA

Case No. S98A1959

Atlanta February 16, 1999

The Honorable Supreme Court met pursuant to adjournment. The following order was passed.

C.W. SMITH, et al. v. GWINNETT COUNTY

Upon consideration of the Motion to Stay Remittitur filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

I certify that the above is a true extract from the Minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court Hereto affixed the day and year last above written.

/s/ Lynn M. Stinchcomb
Chief Deputy Clerk

APPENDIX B

IN THE SUPERIOR COURT
FOR THE COUNTY OF GWINNETT
STATE OF GEORGIA

CIVIL ACTION FILE
NO. 95-A-5000-3

GWINNETT COUNTY, GEORGIA,
Plaintiff,

v.

C.W. SMITH, GRADY SMITH and
SMITH'S LAKE CORPORATION,
Defendants.

GWINNETT COUNTY'S MOTION FOR PAYMENT OF THE COSTS OF REPAIR AND RESTORATION OF FREEMAN LAKE DAM AND BUFFERS

FINAL ORDER REQUIRING THE DEFENDANTS TO PAY COSTS AND ISSUING A PERMANENT INJUNCTION

The County having filed the instant motion, the Court set a hearing for April 27,1998. At that hearing, testimony was presented that the restoration of the lake and all other necessary repairs were complete, except for a few "punch-list" type items. The Defendants thereafter requested thirty (30) days to inspect the work so they could make objections, if any. The Court therefore reserved for further hearing and review the costs of the repair of the Freeman Lake Dam, the restoration of the lake and buffers, the removal of downed trees and debris and erosion control of the Freeman Lake bed, the engineering studies of the Freeman Lake Dam, and compensation of the Court Ordered Monitor.

The Court thereafter set a further status and/or final hearing for accounting purposes for May 29,1998. At that hearing, the Defendants presented their objections through the testimony of Grady Smith. The Court directed the County to check on a few more "punch-list" type items, and a further status and/or final hearing for accounting purposes was set for June 19,1998. Due to illness of Defendants' counsel, the hearing was continued until July 2,1998.

After hearing evidence offered by the County, and after argument of counsel presented at the July 2, 1998 hearing, the Court finds that the remaining "punch-list" items have been completed, and the County is now entitled to a reimbursement of the monies it has reasonably expended in the above-styled case. *See* October 15, 1996 Order for Contempt, Injunctive, and Other Equitable Relief, *aff'd, Smith v. Gwinnett County*, 268 Ga. 179(1997), *and cert. denied* __ U.S. __, 118 S.Ct. 691,139 L.Ed.2d 637 (January 12, 1998). The County has paid for the costs of the repair of the dam and the restoration of Freeman Lake; however, the Court Ordered Monitor, Mr. James Burton, remains unpaid. The Court hereby orders and directs the County to pay Mr. Burton a sum of $14,355.00 for his time served in the above-styled case. The Court finds this to be a reasonable and necessary amount, given the amount of time and effort Mr. Burton has dedicated to this case.

As for the reimbursement, the Court hereby orders and directs the Defendants to pay to the Clerk of Superior Court of Gwinnett County on or before August 3, 1998 the sum of $488,364.89 as the cost of the repair of the dam and the restoration of Freeman Lake, $42,170.00 as attorney's fees, and $14,355.00 as Court Monitor fees, said sums totaling $544,889.89. The Court finds these costs and fees to be reasonable and necessary regarding the repair of the lake and the restoration of the dam and the buffers. As such, there shall be a lien placed on the property described in Exhibit "A" until these costs and fees are timely paid. Should the

Defendants fail to timely pay said costs and fees, the Court shall enter a money judgment against Smith's Lake Corporation and against C.W. Smith and Grady Smith individually, and jointly and severally, and post-judgment interest shall thereafter accrue at the rate of twelve percent (12%) per anum. *See* O.C.G.A. § 9-12-10. The Court also reserves the right to enforce the judgment through lien foreclosure and/or the appointment of a receiver to take control of and sell the subject property. The Defendants shall be personally liable for any deficiency thereafter, and the Court reserves the use of its equitable powers for further enforcement and collection of the same. *See* O.C.G.A. § 23-4-32.

Otherwise, the Defendants are hereby ordered and directed to maintain the property in compliance with applicable local, state, and federal regulations. This Court finds that in order to maintain the health, safety, and welfare of the citizens of Gwinnett County and to prevent future destruction of the subject property, the Court shall retain jurisdiction over the property, and a permanent injunction shall be placed thereon. *See Smith v. Gwinnett County*, 268 Ga. at 181(3) (citing *Fuller v. Dillon*, 220 Ga. 36(1)(f) (1964); O.C.G.A. § 23-1-7). The Defendants, their heirs, assigns, and/or agents are hereby permanently enjoined from engaging in any construction activity, including grading, excavating, or draining the lake; disturbing the buffers on the property, to include cutting, destroying, or otherwise harming any of the trees or vegetation located therein; and destroying, breaching, or otherwise interfering with the dam, except for good cause shown to the Court upon further hearing. Mr. Burton shall remain the Court Ordered Monitor, and from time to time, he may enter the property, without fear of trespass, to view the lake, buffers, and dam so he may apprise the Court of compliance with this Order. Court Monitor fees, if any, shall be assessed against Gwinnett County. The County or its agents may also, without fear of trespass, accompany Mr. Burton on the property to inspect the dam and ensure that it remains structurally sound.

In the event of an appeal of this Order, the Court finds that a notice of appeal will not act as a supersedeas regarding payment of the foregoing costs and fees and the issuance of the permanent injunction. *See* O.C.G.A. § 9-11-62(c); *Howard v. Smith*, 226 Ga. 850, 852 (1970).

SO ORDERED this the 7th day of July, 1998.

/s/ Dawson Jackson
DAWSON JACKSON, Judge
Gwinnett Superior Court

Becky Pearrow, Official Court Reporter

Copies to:
James Burton; G. Hughel Harrison; M. Van Stephens;
Walt M. Britt

EXHIBIT "A"

All that tract or parcel of land lying and being in Land Lots 174, 175 and 185, 6th District. Gwinnett County, Georgia and being more particularly described as follows:

BEGINNING at a point located at the intersection of the westerly right-of-way of Beaver Ruin Road (a 130 foot right of way) with the southerly right-of-way of Plantation Lane (a 60 foot right of way), running thence along said westerly side of Beaver Ruin Road right of way, and following the curvature and arc thereof, 515.21 feet to a point (said arc having a radius of 1,497.739 feet); running thence along the westerly right of way of Beaver Ruin Road South 19 degrees 24 minutes east a distance of 183.29 feet to a point (said point being the northeast corner of Lot 1, Block A of Arcadia Forest Subdivision); running thence along the northwesterly lines of Lots I through 11, said block and subdivision, along the northwesterly terminus of Evangeline Way (a 60 foot right of way not opened) and along the northwesterly line of Lot 12, said block and subdivision south 60 degrees 44 minutes 30 seconds west a distance of 1,525.7 feet to an iron pin found on the east land lot line of Land Lot 174 and the property line of Lake Freeman. Inc. as more particularly described in that certain Georgia Limited Warranty Deed from the Federal Deposit Insurance Corporation to Lake Freeman, Inc., dated June 12, 1979, as recorded in Deed Book 1788, Page 230, Gwinnett County, Georgia Records (said Lake Freeman property being hereinafter referred to as the "Lake Freeman Property"); running thence along said Lake Freeman Property line north 31 degrees 21 minutes west a distance of 50 feet to a point; running thence along said Lake Freeman Property south 77 degrees 31 minutes west a distance of 669.0 feet to an iron pin found said point being located on the property line of property now or formerly owned by the Federal Deposit Insurance Corporation; running thence along said property line of the Federal Deposit Insurance Corporation the following calls: running

thence north 29 degrees 34 minutes west a distance of 237.4 feet to a point; running thence south 86 degrees 26 minutes west a distance of 193.1 feet to an iron pin found; running thence north 69 degrees 28 minutes west a distance of 399.6 feet to an iron pin found; running thence north 45 degrees 12 minutes west a distance of 100 feet to an iron pin found; running thence north 45 degrees 49 minutes 30 seconds west a distance of 199.8 feet to a point; running thence north 86 degrees 56 minutes 30 seconds west a distance of 70.0 feet to a point; running thence south 52 degrees 56 minutes 30 seconds west a distance of 100 feet to an iron pin found; said iron pin being located on the property line of property now or formerly owned by Vulcan Materials Co.; running thence along said property line of Vulcan Materials Co. the following calls: running thence north 11 degrees 00 minutes west a distance of 86.1 feet to a point; running thence north 19 degrees 33 minutes east a distance of 82.4 feet to a point; running thence north 24 degrees 59 minutes east a distance of 50.8 feet to a point; running thence north 32 degrees 32 minutes east a distance of 36.0 feet to a point; running thence north 50 degrees 18 minutes east a distance of 23.4 feet to a point; running thence north 58 degrees 15 minutes east a distance of 71.2 feet to a point; running thence north 60 degrees 24 minutes east a distance of 132.2 feet to a point; running thence 49 degrees 26 minutes east a distance of 147.6 feet to a point; running thence north 37 degrees 36 minutes east a distance of 43.4 feet to a point; said point being located on the property line of property now or formerly owned by Ronnie Lane; running thence along the property line of Ronnie Lane the following calls: running thence north 65 degrees 54 minutes 30 seconds east a distance of 471.0 feet to an iron pin found, running thence north 03 degrees 22 minutes 30 seconds west a distance of 75.1 feet to an iron pin found, said iron pin being located at the Southwestern corner of Lot 12, Block A, unit 1 of the V. W. Freeman Subdivision; running thence along the southwesterly, southerly southeasterly and easterly lines of Lots 12, 11, 10, 9, 8, 7, 6, 5, 4, 3, 2, and 1,

said block, unit and subdivision the following calls: running thence south 69 degrees 19 minutes 30 seconds east a distance of 90.0 feet to an iron pin found; running thence north 77 degrees 02 minutes east a distance of 110.7 feet to a 1-inch pipe; running thence south 85 degrees 28 minutes 30 seconds east a distance of 147.6 feet to a 1-inch pipe; running thence north 87 degrees 32 minutes 30 seconds east a distance of 91.9 feet to a 1-inch pipe; running thence north 74 degrees 28 minutes 30 seconds east a distance 285.9 feet to an iron pin found; running thence 16 degrees 35 minutes east a distance of 161.5 feet to a point; running thence north 22 degrees 44 minutes east a distance of 195.3 feet to a point; running thence north 60 degrees 00 minutes east a distance of 89.7 feet to a point; running thence north 88 degrees 31 minutes 30 seconds east a distance of 390.0 feet to an iron pin found; running thence north 72 degrees 46 minutes east a distance of 138.0 feet to an iron pin found; running thence north 36 degrees 20 minutes east a distance of 136.8 feet to an iron pin found; running thence north 65 degrees 50 minutes east a distance of 95.0 feet to an iron pin found; running thence north 53 degrees 29 minutes west a distance to 57.3 feet to a point on the southerly side of Plantation Lane (a 60 foot right of way); running thence along said right of way of Plantation Lane along an arc of a curve to the right a distance of 102.44 feet to a point (said arc having a radius of 219.110 feet); running thence along said right of way of Plantation Lane south 51 degrees 43 minutes 30 seconds east a distance of 502.5 feet to a point; running thence along said right of way of Plantation Lane along an arc of a curve to the left a distance of 77.2 feet (said arc having a radius of 242.207 feet) to a point and the POINT OF BEGINNING containing 72.71 acres as more particularly shown on that certain survey for Park Corporation dated April 19, 1980, revised May 1, 1980, revised May 5, 1980, as last revised May 9, 1980 as prepared by Watts & Browning Engineers and bearing the certification and seal of A. W. Browning, Registered Land Surveyor No 490; said property being the same property de-

scribed as Tract No. 3 in that certain Deed to Secure Debt from Frazier Enterprises, Inc. to the Hamilton Mortgage Corporation, it being the intent of Grantor to convey all the property described therein as Tract No. 3.

Less and Except any Right of Way Deeds, Easements or Restrictions of Record.

APPENDIX C

IN THE SUPERIOR COURT
OF GWINNETT COUNTY
STATE OF GEORGIA

Civil Action File No. 95-A-5000-3

GWINNETT COUNTY, GEORGIA
Plaintiff,

v.

C. W. SMITH, GRADY SMITH
and SMITH'S LAKE CORPORATION
Defendants.

FINAL JUDGMENT AND ORDER APPOINTING RECEIVER

Whereas it appears that on July 7, 1998, this Court entered a Final Order Requiring the Defendants to Pay Costs and Issuing a Permanent Injunction, said payment of costs to be paid to the Clerk of Gwinnett Superior Court on or before August 3, 1998;

Whereas it appears said payment of costs remains unpaid;

Wherefore the Court hereby enters a judgment against Smith's Lake Corporation and against C.W Smith and Grady Smith individually and jointly and severally in the amount of $544,889.89, with post-judgment interest accruing hereafter at the rate of twelve percent (12%) per anum. *See* O.C.G.A. § 9-12-10. Further, the Court hereby appoints John F. Doran, Jr. as a receiver to take control of and sell the property at issue. *See* O.C.G.A § 9-8-1 *et seq.* Mr. Doran, as the Court Ordered Receiver shall have the authority to enter and inspect the property, without fear of trespass, to investigate the value of the property and to determine the best method of selling the property to satisfy said judgment and the lien on the property in favor of

Gwinnett County, said authority to include the power to hire an independent appraiser(s). Said appraiser(s) shall likewise have the authority to go on or about the subject property for the purpose of investigation and determination of value of the property. The initial costs of appraisals, if any, shall be paid by Gwinnett County. The Court reserves the right to assess appraisal costs against the Defendants and subject the property to a lien thereon. The Court likewise reserves the right to assess Receiver costs against the Defendants and to subject the property to a lien thereon. A further hearing is hereby scheduled to consider the Receiver's report and recommendations on **October 2, 1998 at 2:00 p.m. in Courtroom 3-F** in the Gwinnett Justice and Administration Center, Lawrenceville, Georgia.

SO ORDERED, this 4th day of August, 1998.

/s/ Dawson Jackson
DAWSON JACKSON, Judge
Gwinnett Superior Court

Copies to:
John F. Doran, Jr.
James Burton
G. Hughel Harrison
M. Van Stephens
Walt M. Britt

APPENDIX D

Consultation - Restricted Assignment

Smith's Lake Corporation Property

THE STRIPLING SHAW STRIPLING GROUP
AN ASSOCIATION OF INDEPENDENT
REAL ESTATE APPRAISERS
COMMERCIAL • RESIDENTIAL APPRAISERS
& CONSULTANTS

W. S. Stripling, MAI
Wayne Shaw
William Todd Stripling

6165 Crooked Creek Road
Norcross, Georgia 30092
(770) 449-1600
Fax (770) 449-6110

20 October 1998

Mr. John F. Doran, Jr.
Attorney and Counselor at Law
260 Constitution Boulevard
Post Office Box 1415
Lawrenceville, GA 30246

Re: Consultation - Restricted Assignment
Smith's Lake Corporation Property

Dear Mr. Doran:

As requested, we have conducted market research and have completed preliminary analyses. As agreed upon, and in keeping with your needs, this consultation is presented in a restricted format. More extensive information is maintained in the appraiser's files.

The term "scope of the assignment" means the extent of the process of collecting, confirming, and reporting data. The scope

of the work performed in this assignment includes the definition of the problem, inspection of the subject property, collection, verification and analysis of data, preparation of a report presenting the data gathered and conclusions for this assignment.

Information gathered includes land sale information, taxes, zoning, flood zone, population, and other pertinent information. Information was gathered from Gwinnett County and surrounding Metro Atlanta areas. Sources include buyers, sellers, brokers, agents, local authorities, public records, secondary publications, and property owners. Verification typically includes contact with a party to a transaction, field inspections, and reviews of public records.

The function of this assignment is to assist the client with determining the value of the subject tract or, as the case may be, assist with determining if in fact the subject has a measurable value.

Subject Description

The subject property consists of Freeman Lake located along the southwest side of Beaver Ruin Road in Land Lots 174, 175, and 185 of the 6th District, Gwinnett County, Georgia. The property contains a total of 72.71 acres and consists primarily of the lake area with a small amount of adjacent shore line land. As of the effective date of this assignment, 20 October 1998, the lake has been drained.

In our attempt to determine what value the subject land may have, we have considered the potential market for the subject as a lake. Because of the minimal amount of useable land associated with the lake and the minimal accessibility along Beaver Ruin Road, the first avenue of consideration is to account for the surrounding, adjacent tracts. In other words, by looking at the adjacent tracts and their uses, an exercise in judgement is then developed whereby the appraiser seeks to determine if the subject would have any marketability to any of the adjacent tracts.

There are three subdivisions adjacent to the subject. First, located along the southern edge of the lake, is the Arcadia Forest subdivision, second, along the northwest edge of the property is the V.W. Freeman subdivision, and third, along the southwestern edge of the subject, is the Parklake subdivision. A fourth adjacent tract is located along a small portion of the subject's northwest property line owned by Vulcan Materials Company that is part of the rock quarry located northwest of the subject. A fifth adjacent tract, is located along a portion of the northwest property line with ownership vested in Nancy T. Ivy.

The three subdivisions are in the price range wherein a homeowner's association would most likely prove impractical and thus the potential purchase of the lake would not be likely. There appears to be no demonstrable market need or use for the subject by Vulcan Materials, the fourth tract. The fifth adjacent tract is a self-contained, independent industrial/commercial building located along Steve Reynolds Boulevard and would not directly benefit from ownership in the subject tract.

These observations lead to a conclusion that there does not appear to be a market for the subject as a free standing lake. Thus, one remaining alternative would be to fill a portion of the lake along the Beaver Ruin frontage and thereby gain some useable commercial acreage.

At this point our expertise becomes limited. First, the various required state and federal agencies must be contacted in order to determine if, in fact, any portion of the lake could be filled. This first step may prove to be insurmountable. Secondly, a detailed engineering study and cost estimate would be required in order to determine the financial feasibility of filling in a portion of the lake and to what extent and size that portion may be.

In conclusion, it would appear that the only potential value of the subject rests within the ability of the lake, or a portion thereof, to be filled-in to gain useable commercial acreage along Beaver

Ruin Road. As mentioned, without further information, some of which is outside our expertise, additional hypotheses and analyses may prove to be beneficial.

We await your further instructions.

This business is appreciated, and we trust that this information is satisfactory and serves your purposes. Please do not hesitate to call if any further assistance is required.

Sincerely,

THE STRIPLING SHAW
STRIPLING GROUP

/s/ William Todd Stripling
William Todd Stripling
Certified Real Estate Appraiser
GA#1291

WTS:mjl

CERTIFICATION

The undersigned does hereby certify that, except as otherwise noted in this appraisal report:

1. The statements of fact contained in this report are true and correct.

2. The reported analyses, opinions, and conclusions are limited only by the reported assumptions and limiting conditions, and are my personal, unbiased professional analyses, opinions, and conclusions.

3. I have no present or prospective interest in the property that is the subject of this report, and I have no interest or bias with respect to the parties involved.

4. The compensation is not contingent upon the reporting of a predetermined value or direction in value that favors the cause of the client, the amount of the value estimate, the attainment of a stipulated result, or the occurrence of a subsequent event.

5. The analyses, opinions, and conclusions were developed and this report has been prepared, in conformity with the Uniform Standards of Professional Appraisal Practice.

6. A personal inspection has been made of the property that is the subject of this report.

7. No one provided significant professional assistance to the person signing this report.

The Appraisal Institute conducts a voluntary program of continuing education for its designated members. MAI's and SRA's who meet the minimum standard of this program are awarded periodic educational certification.

RESTRICTION UPON DISCLOSURE AND USE

Disclosure of contents of this appraisal report is governed by the By-Laws and Regulations of the Appraisal Institute.

Neither all nor any part of the contents of this report (especially an conclusions as to value, the identity of the appraiser or the firm with which he is connected) or any reference to the Appraisal Institute or to the MAI or SRA designation shall be disseminated to the public through advertising media, public relations media, news media, sales media or any other public means of communication without the prior written consent and approval of the undersigned.

/s/ William Todd Stripling
William Todd Stripling
Certified Real Estate Appraiser
GA#1291

Supreme Court, U.S.
FILED
MAY 12 1999
CLERK

(2)

DOCKET NO. 98-1638

THE SUPREME COURT OF THE UNITED STATES

OCTOBER 1999 TERM

****

C. W. SMITH, SMITH'S LAKE CORPORATION and

GRADY SMITH, Petitioners,

vs.

GWINNETT COUNTY, GEORGIA, Respondent.

****

On Petition for Writ of Certiorari to the

Supreme Court of Georgia

****

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

****

M. Van Stephens, II
Chief Assistant County Attorney
Georgia Bar No. 679950

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Lawrenceville, Georgia 30045
(770) 822-8700

2818

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Although the Petitioners seek to fashion this case as one in which Gwinnett County has taken their property for public use without just compensation, the facts of the case do not support this allegation.

This case involves an attempt by landowners to maximize the development of their property at the expense of their neighbors. The Petitioners purchased a 70- acre parcel which consists primarily of a lake, dam, and wetlands. The property has been zoned for commercial purposes for almost 30 years, but the property has never been developed. While the property may arguably have one to two acres which are developable at present, the Petitioners sought to maximize their profits by creating additional building areas in such a way as to alter the floodplain and destroy wetlands.

Immediately after purchasing the property in 1995, the Petitioners used heavy equipment to dig a hole through the dam and drain the lake. The Petitioners then channeled the lakebed in an effort to reclaim portions of

the lakebed for commercial purposes. The Petitioners filled portions of the lakebed with dirt and other material from off-site. In channeling the waters and filling portions of the lakebed, the Petitioners expanded the floodway which traverses the vast majority of the property. This expansion presented an immediate danger to the lives and property of neighbors by increasing the risk of flooding. The Petitioners also destroyed wetlands on the property without any attempt to engage in a wetlands mitigation project. The destruction of wetlands also facilitated the Petitioners' attempt to commercially develop the property.

The Petitioners destroyed mature trees in a buffer area required by local law.

A buffer is established between commercial properties and residential properties as a matter of public policy to protect mature residential areas. The Petitioners knocked down over 800 trees and graded the surface of the buffer area down approximately eight feet. The destruction of the buffer occurred in the face of the County's daily efforts to stop the destruction by issuance of citations for violations of local ordinances.

The Petitioners' actions were taken in open defiance of local, State, and Federal regulations. The Petitioners realized that if they complied with these regulations by submitting plans detailing their development activities within the floodway, wetlands, and buffer, the amount of land which could be developed for commercial purposes would be severely limited. Instead, the Petitioners refused to apply for a permit and commenced

grading activities on the site in hopes that it would be easier to get forgiveness than permission. The Petitioners' actions reflect a conscious indifference with regard to the health, safety, and welfare of their neighbors. The Petitioners' conduct was calculated to maximize the commercial potential of their property in violation of local, State, and Federal laws.

While the Petitioners seek to frame this controversy as one involving a taking of private property without just compensation, the express language of the Trial Court's Order refutes the Petitioners' position. The Trial Court's Order merely enjoined the Petitioners from engaging in construction activity on the property except for good cause shown to the Trial Court upon further hearing. Since the Petitioners refused to compile the necessary engineering reports to facilitate

the issuance of a land disturbance permit for the area, the Court required that if the Petitioners wished to further develop their property, they must submit the engineering plans, floodway authorization data, and wetlands mitigation studies to the Court to ensure that further development would not impermissibly alter the floodway or endanger the lives and property of neighboring residents. The Trial Court did not prevent the development of the property, it merely exercised equitable jurisdiction to ensure that any further development of the property would be consistent with local, State, and Federal regulations. As such, the Court's Order substantially advanced a legitimate State interest in preventing the alteration of a floodway in a mature residential area.

The facts of this case do not present an issue which is deserving of this Court's consideration. The Petitioners have previously petitioned for a Writ of Certiorari to this Court during 1997, and the Petition for Writ of Certiorari was denied. C. W. Smith, Smith's Lake Corporation and Grady Smith, v. Gwinnett County, Georgia, Docket No. 97-709. In this second Petition for Writ of Certiorari, the Smiths raise an identical takings issue and cite the same cases previously presented to this Court. In addition, the Smiths have raised this taking issue before the Trial Court and Georgia Supreme Court on three previous occasions, and the Trial Court and Georgia Supreme Court have consistently ruled that the facts presented by the Smiths do not constitute a taking of private property without just compensation.

Gwinnett County has never indicated any interest in taking or acquiring the subject property for any purpose. Instead, the Smiths have purchased a property which consists primarily of an existing lake and associated wetlands and have subsequently taken numerous actions to create an area of commercial development on top of portions of the wetlands and lakebed. In doing so, the Smiths have breached the existing dam on the property and have created a flood hazard which threatens a community's sole access to their subdivision.

While the Smiths would have this Court believe that the Gwinnett Superior Court has taken their property away from them, the Court's Orders in this case clearly indicate otherwise. After the Smiths completely ignored the discovery process, and in response to a Motion to Compel Discovery, the Smiths

and the County entered into a Consent Agreement whereby the Smiths would repair the Freeman Lake Dam after obtaining direction from a licensed engineer. The Consent Order is important in that it indicates the Smiths' agreement that the repair of the Freeman Lake Dam and the restoration of the Freeman Lake are necessary prior to any further development activities on the property. The Consent Order is also important in that it evidences the County's willingness to allow the Smiths to correct the problem which they created by breaching the dam.

It was only when the Smiths completely disregarded the Consent Order that the County filed a Motion for Contempt and sought Court intervention in the actual repair of the dam. Even then, the County had no desire to be burdened with the repairs to the Freeman Lake

Dam, and the County merely requested that the Court sanction the Smiths for failing to abide by their agreement as evidenced by the Consent Order. Many of the Smiths' actions during the pendency of the contempt proceeding, however, resulted in the Court's determination that the Smiths should not be permitted to continue construction activity on the dam. Instead, the Court ordered the County to repair the dam and restore the lake utilizing a bidding process and billing the Smiths for the cost.

While the Smiths have indicated to this Court that they were almost finished repairing the dam when the Court entered its Order, the facts of this case clearly indicate otherwise. Instead of repairing the dam, the Smiths began destroying large mature trees on the side of the property completely removed from the dam.

These trees were within a required 75-foot buffer area, and once the trees were knocked down, they could not be replaced. While knocking down the trees, the Smiths took the position that the County's Zoning Resolution concerning such buffer areas did not apply to them. When the County repeatedly served citations upon the Smiths for violation of the buffer, the Smiths literally continued knocking down trees near the officers serving the citations. The Smiths knocked down large trees within three feet of their property lines, and their actions as observed by the County's employees indicated that the Smiths believed that once the trees were knocked down, their purpose had been accomplished and County Ordinances could not defeat their development scheme.

Not only did the Smiths completely destroy large mature trees in the buffer area, the Smiths dug into the existing grade of the land to remove entire portions of the subject property to a depth of over eight feet. In doing so, the Smiths intentionally ruptured a nearby resident's sewer line leading from her home to the County's sewer main which traverses the Smiths' property. The Smiths openly contended that although the sewer line had been in place for more than twenty years, the resident did not have the right to maintain a sewer line from her property to the County's sewer main. The Smiths refused to allow County employees to repair the ruptured sewer line or enter onto the Smiths' property during a time in which sewage was overflowing in the resident's home.

It is interesting to note that the Smiths ruptured the resident's sewer line the night

before the contempt hearing on this matter. The Smiths' actions indicated to the Superior Court Judge that the Smiths were willing to openly defy the Court's Order and would continue to develop the property as they saw fit until someone physically stopped them from doing so. In fact, during the contempt hearing before the Superior Court the day after the sewer line was ruptured, Grady Smith told the Judge that the Judge could put him in jail, but the Judge could not stop him from knocking down trees on the subject property. During the contempt hearing, another witness testified that when he confronted the Smiths concerning their actions in knocking down trees within the buffer area, Grady Smith stated that he was a multimillionaire and could do whatever he wanted.

Not only did the Smiths completely obliterate the buffer required by County Zoning Ordinances, but the Smiths also destroyed large areas of wetlands surrounding the lake. The Smiths cleared over 800 trees in the area surrounding the lake, and the Smiths dug trenches in the lakebed and wetlands area which had the effect of removing waters from the wetlands on a continuous basis and channeling it into a small area of the property. The Smiths' activities violated Federal law, and the United States Environmental Protection Agency, at the urging of the United States Army Corps of Engineers, issued an Order requiring the Smiths to cease and desist from their activities, to refill the trenches, and to restore the lake and wetlands areas prior to

any further construction efforts. The Smiths completely ignored the Environmental Protection Agency's Order and continued to grade in the wetlands.

The facts of this case reveal property owners who were determined to develop their property in violation of local, State, and Federal regulations and in the face of almost daily citations. The Smiths took the position that they could develop their property as they wished, and they refused to cease development until physically forced to do so.

With regard to the Smiths' allegation that the Court's Order denies them all economically beneficial or productive uses of their property, the County submits that the present zoning of the property provides evidence to the contrary. The property is zoned C-2 Commercial and presently has an area

adjacent to the intersection of Beaver Ruin Road and Arcadia Drive where commercial development could have physically occurred prior to the Smiths' draining of the lake. The Smiths' actions after draining the lake evidence a plan to broaden this area so as to accommodate additional commercial development on the land.

The Smiths' actions were designed to decrease the size of the lake and drain portions of the surrounding wetlands. The Smiths' actions to date in broadening the area where commercial construction activity could occur refute their contention that the Court's Order deprives them of all economically beneficial uses of the land.

Since the property's zoning in the early 1970's, the County has recognized that the property can be put to commercial uses. The

County merely wishes to exercise its police power to ensure that wetlands are not inappropriately destroyed and to ensure that the floodplain is not encroached upon in violation of Federal law. The safety of those who travel daily on the County roadway directly below the dam is the County's paramount concern in this matter. The Smiths' actions in constructing a dam which by all expert accounts to date in this case is inadequate and unsafe mandated the Superior Court's action in approving the construction of a safe dam and any new development on the property.

ARGUMENT AND CITATION OF AUTHORITY

Pursuant to Rule 10, this Court does not review Petitions for Writs of Certiorari as a matter of right but grants such Petitions only

for compelling reasons. Gwinnett County respectfully submits that the Smiths' Petition for a Writ of Certiorari does not raise an important question of the type specified in Rule 10 but merely involves a property owner's attempt to develop his property without complying with local, State, and Federal development regulations. As such, the Smiths' Petition for Writ of Certiorari is inappropriate, and Gwinnett County respectfully requests that this Court deny the Smiths' Petition.

The facts of this case indicate that the Gwinnett County Superior Court was merely dealing with a local development dispute which forced the Superior Court to resort to its equitable jurisdiction. The Smiths openly defied existing Court Orders, and their actions clearly indicated that if they were

permitted to continue construction activities on the property, damage to the public health, safety, and welfare would result.

In light of this fact scenario, the Court exercised its equitable jurisdiction to ensure that when the Smiths are ready to further develop their property, they will be required to demonstrate to the Court that they have taken the proper precautions to avoid impermissibly altering the floodplain or illegally destroying wetlands. The Superior Court noted that where equity acquires jurisdiction for any purpose it will retain jurisdiction to give full and complete relief, whether legal or equitable, as to all purposes related to the subject matter. Fuller v. Dillon, 220 Ga. 36 (1964). See also Official Code of Georgia Annotated § 23-1-7. The Trial

Court took control of the property to repair the dam, restore the lake, and review and approve the Smiths future development of the property, the Trial Court's action did not work a destruction of the Defendants' private property without just and adequate compensation. Compare Lamar Advertising of South Georgia, Inc. v. City of Albany, 260 Ga. 46 (1990).

This Court has previously recognized that a valid exercise of the police power is ipso facto not a taking requiring payment of compensation. Nollan v. California Coastal Commission, 483 U.S. 825 (107 SC 3141, 97 LE 2d 677) (1987). This Court has also recognized that a governmental regulation must deny a property owner all economically viable

uses of his property in order to require payment of just compensation. See Agins v. Tiburon, 447 U.S. 255 (100 SC 2138, 65 LE2d 106) (1980). In the case at bar, the Petitioners have utterly failed to prove that they have been denied all economically viable uses of their property. To the contrary, the subject property has been zoned for commercial purposes since the early 1970's, and all parties contemplate that the property may be further developed for commercial purposes at some point in the future. Presently, however, the Smiths have violated County, State, and Federal development regulations in attempting to expand development on the property at the expense of federally protected wetlands.

Gwinnett County also asserts that the Smiths takings claim in this case is not ripe for consideration by either the Trial Court or

this Court. It is well established law that a takings claim will not be considered ripe for adjudication until the governmental entity charged with implementing the subject regulation has reached a final decision regarding its application of the regulations to the Claimant's property. Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172, 186 (1985). In the present action, the Smiths have failed to submit any develoment plan for consideration by the County, and the County has accordingly not been called upon to make a final decision regarding the application of the regulations to the Smiths' property. Since the question of ripeness is one of subject matter jurisdiction, a takings claim cannot proceed without an application for a permit to develop

the property. See, e.g., Penn Central Transportation Company v. City of New York, 438 U.S. 104 (1978); McDonald, Sommer and Frates v. Yolo County, 477 U.S. 340 (1986); Hodel v. Virginia Surface Mining and Reclamation Association, Inc., 452 U.S. 264 (1981). Since the County's Regulation requiring a Development Permit prior to grading or excavating in a floodway or in wetlands furthers a substantial State interest in protecting water courses from siltation and in protecting surrounding property owners from an illegal expansion of the floodplain, this case should not be allow to proceed. The Trial Court appropriately exercised its equitable powers in requiring the Smiths to present engineering plans before authorizing construction activity on the property.

See Dolan v. City of Tigard, 512 U.S. 374 (1994).

CONCLUSION

Gwinnett County respectfully submits that the Superior Court's Order enjoining further construction activity except for good cause shown to the Trial Court after further hearing does not rise to the level of a controversy which merits this Court's consideration on a Petition for Writ of Certiorari. The Trial Court merely exercised its equitable powers to ensure that when the Petitioners are ready to develop their property, their development plans will be reviewed for compliance with all local, State, and Federal regulations prior to such development activity. In light

of the Petitioners' refusal to apply for or obtain development permits in the past, the Trial Court's Order is directly related to the protection of the public health, safety, and welfare by ensuring that future development will not alter the floodway in a manner which would endanger lives or property.

WHEREFORE, Gwinnett County respectfully requests that the Smiths' Petition for Writ of Certiorari be denied.

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